Supreme Court, U. S.
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80-768

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

AMUSEMENT AND MUSIC OPERATORS ASSOCIATION, DON VAN BRACKEL, DOROTHY W. CHRISTENSEN, FRED COLLINS, JR., WALTON LOWRY, and HAROLD MORRIS,

Petitioners,

v.

THE COPYRIGHT ROYALTY TRIBUNAL, MARY LOU BURG, Chairman, THOMAS C. BRENNAN, DOUGLAS E. COULTER, CLARENCE L. JAMES, JR., and FRANCES GARCIA, Members,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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THE QUESTIONS PRESENTED

1. Whether in view of the plain language of Section 810 of the Copyright Act of 1976 (17 U.S.C. 810) the court of appeals erred in holding that that section vests in that court jurisdiction to review regulations promulgated by the Copyright Royalty Tribunal ("Tribunal") under Section 116(c)(5) of the Copyright Act (17 U.S.C. 116(c)(5)).

2. Whether, in view of the provisions of section 803(a) of the Copyright Act (17 U.S.C. 803(a)) and relevant provisions of the Administrative Procedure Act (5 U.S.C. 702-706) and of the Judicial Code (28 U.S.C. 1331, 1361, 1651 and 2201), the district court had jurisdiction to review the regulations promulgated by the Tribunal under section 116(c)(5) of the Copyright Act (17 U.S.C. 166(c)(5)) and to grant the declaratory and injunctive relief prayed for.

3. Whether, in view of the fact that on October 27, 1978 when petitioners filed their complaint in the district court petitioners previously had filed a petition for reconsideration by the Tribunal which petition was then pending and was denied by the Tribunal on November 9, 1978, the court of appeals properly refused to act upon the complaint as the equivalent of a timely filed petition for review under section 810 of the Copyright Act (17 U.S.C. 810).

THE PARTIES

The parties to this proceeding are as listed in the caption of the case except that the present chairman of the Tribunal is Mary Lou Burg.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

AMUSEMENT AND MUSIC OPERATORS ASSOCIATION, DON VAN BRACKEL, DOROTHY W. CHRISTENSEN, FRED COLLINS, JR., WALTON LOWRY, and HAROLD MORRIS,

Petitioners,

v.

THE COPYRIGHT ROYALTY TRIBUNAL, MARY LOU BURG, Chairman, THOMAS C. BRENNAN, DOUGLAS E. COULTER, CLARENCE L. JAMES, JR., and FRANCES GARCIA, Members,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Amusement and Music Operators Association ("AMOA") and the individual petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on August 7, 1980, the

denial of petition for rehearing on September 9, 1980, and the denial of motion for further reconsideration of petition for rehearing on October 22, 1980. The issues are whether 17 U.S.C. 810 confers exclusive jurisdiction on the United States Court of Appeals for the judicial review of rule-making by the Copyright Royalty Tribunal, or whether persons aggrieved by such rule-making may seek judicial review in the federal district courts. The Court of Appeals for the District of Columbia Circuit has decided that it has exclusive jurisdiction; petitioners, who initiated their review in the District Court for the District of Columbia, believe that the district court is not only the proper forum but that it is the exclusive forum.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, dated August 7, 1980, has not been reported, but is set forth in its entirety in Appendix D. The court's orders denying petitioners' petition for rehearing are set forth in Appendices E and F. The court's order denying petitioners' motion for further consideration of the petition for rehearing is set forth in Appendix G.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit printed in Appendix D, was entered August 7, 1980. That court's orders denying a timely petition for a rehearing *en banc*, printed in Appendices E and F, were entered on September 9, 1980. The said court's order denying further reconsideration of the petition for rehearing,

printed in Appendix G was entered on October 22, 1980.

The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. 1254(1). The proper forum for judicial review of agency actions under the Copyright Act is an important question of federal law that affects all users and suppliers of copyrighted music who are subject to sections 111, 115, 116 and 118 of the Copyright Act. As a precedent the decision below also affects all persons who seek judicial review of federal agencies' rulemaking. This question should be settled by this Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The due process clause of the Fifth Amendment to the Constitution provides:

"No person shall . . . be deprived of life, liberty or property, without due process of law."

Relevant provisions of the statutes (Sections 116(b), 116(c), 801(b), 803(a) and 810 of the Copyright Act, sections 3501, 3502 and 3512 of the Federal Reports Act, and the relevant sections of the Administrative Procedure Act and of the Judicial Code and the regulations (37 C.F.R 303.1-303.3) are lengthy and therefore are set out in pertinent part in Appendices H through L. A brief summary of the statutory and regulatory provisions follows:

Section 116(b) of the Copyright Act provides that a jukebox operator may obtain a license for playing copyrighted music on jukeboxes by registering the jukeboxes with the Copyright Office and paying an annual license fee of $8 per jukebox.

Section 116(c) provides that jukebox license fees which are collected by the Copyright Office shall be deposited in the United States Treasury, after deducting expenses of the Copyright Office, and that the fees shall be distributed to copyright owners making claims therefor by the Copyright Royalty Tribunal after deduction of the Tribunal's expenses. Section 116(c)(5) authorizes the Tribunal to promulgate regulations whereby persons having claims to jukebox royalties can have access to establishments where the jukeboxes are located and to the jukeboxes therein to obtain information concerning the amount of royalties they claim.

Section 801(b) of the Copyright Act authorizes the Tribunal to make determinations, inter alia, as to jukebox royalty rates (801(b)(1)) and as to distribution of jukebox royalties (801(b)(3)).

Section 803(a) of the Copyright Act authorizes the Tribunal to adopt regulations to govern its procedures and methods of operation and provides that, except as otherwise provided in Chapter 8 of the Act, the Tribunal shall be subject to Chapters 5 and 7 of the Administrative Procedure Act.

Section 810 of the Copyright Act provides for direct review by the United States Court of Appeals of any final decision of the Tribunal under Section 801(b) on the basis of the record before the Tribunal and in accordance with Chapter 7 of the Administrative Procedure Act.

Sections 3501, 3502 and 3512 of the Federal Reports Act declare that information needed by federal agencies shall be obtained with a minimum burden upon business enterprises, especially small businesses,

and require that independent Federal regulatory agencies shall submit to the Comptroller General of the United States for his review their proposed regulations for collection of information from business enterprises or other persons in advance of issuance of the regulations.

Relevant sections of the Administrative Procedure Act include 702 (right of review), 703 (forum and venue of proceeding), 704 (actions reviewable), 705 (relief pending review) and 706 (scope of review).

Relevant sections of the Judicial Code include 1331 (Federal question jurisdiction), 1361 (mandamus), 1651 (all writs), and 2201 (declaratory judgments).

Sections 303.1, 303.2 and 303.3 of the regulations promulgated by the Tribunal under Section 116(c)(5) of the Copyright Act prescribe the procedures whereby persons having claims to jukebox royalties can have access to establishments where jukeboxes are located and to jukeboxes therein; these regulations also impose upon jukebox operators the requirement that they must record with the Tribunal lists of the locations of jukeboxes they have registered with the Copyright Office pursuant to the Copyright Act.

STATEMENT OF THE CASE

Petitioners, AMOA and five individual jukebox operators, filed a complaint on October 27, 1978 in the United States District Court for the District of Columbia against the Tribunal and its five members, who are respondents here, for declaratory judgment and injunction to declare invalid and to enjoin enforcement of the regulations that the Tribunal had promulgated under

section 116(c)(5) of the Copyright Act. Petitioners also applied for a temporary restraining order and preliminary injunction.

The Tribunal promulgated the regulations on September 6, 1978, after extensive rulemaking proceedings that began in December 1977. The regulations were declared to be effective October 10, 1978, and required jukebox operators to record with the Tribunal lists of their jukebox locations, commencing November 1, 1978. Operators obtaining their initial jukebox registration after October 1, 1978 were required to record their location lists within 30 days after registration. On October 1st of each succeeding year operators are required to record locations not previously reported and all other locations where changes have been made in the number of jukeboxes as previously reported. On October 18, 1978 petitioners filed a motion for reconsideration of the regulations, and the Tribunal heard and denied the motion on November 9, 1978.

Petitioners sought relief in the district court on several grounds: (1) the regulations, by requiring jukebox operators to record location lists, are not authorized by the Copyright Act, (2) they violate the Act's prohibition against expense or harassment to the operators, (3) they unduly interfere with the operators' conduct of their businesses in violation of the fifth amendment to the Constitution, (4) they were issued in violation of the Federal Reports Act, and (5) the regulations are invalid because the Tribunal itself is unconstitutionally established in the legislative branch of the Government.

The district court, after hearing, denied petitioners' motion for temporary restraining order and preliminary injunction on October 30, 1978 (Appendix A), and the Court of Appeals for the District of Columbia Circuit, on November 1, 1978, denied petitioners' motion to overrule the district court and granted respondents' cross motion for summary affirmance in Appeal No. 78-2065 (Appendix B). In those actions both the district court and the court of appeals assumed that they had jurisdiction, and their decisions were on the merits. The respondents also assumed the jurisdiction of the district court.

Thereafter, petitioners filed a motion in the district court for summary judgment and respondents filed a cross motion for dismissal, or, in the alternative, for summary judgment. On February 22, 1979, the district court granted respondents' motion and dismissed the complaint (Appendix C). The district court's order was docketed February 27, 1979. Petitioners appealed to the United States Court of Appeals for the District of Columbia Circuit on April 23, 1979.

While the appeal was pending, and after the parties had filed their briefs, the court of appeals, *sua sponte*, ordered the parties to brief the question whether in view of 17 U.S.C. 810 the district court had jurisdiction to review the regulations that are the subject of this litigation. In their briefs on this question *both* parties agreed that 17 U.S.C. 810 does not grant jurisdiction to the court of appeals to review the Tribunal's regulations and that the district court has exclusive jurisdiction to do so. Copy of the respondents' brief is included in the appendix (Appendix M).

On August 7, 1980, after considering the parties' briefs and arguments on all issues, including the issue of jurisdiction, the court of appeals rules that the district court did not have jurisdiction to review the regulations but that, instead, the court of appeals has the exclusive jurisdiction to do so under 17 U.S.C. 810. The court ordered the case to be remanded and the complaint to be dismissed by the district court for lack of jurisdiction.

By a footnote to its decision the court of appeals included the following comment:

> "[5] The complaint in the District Court was filed 37 days after the promulgation of the regulations at issue. Petitions for review of Tribunal regulations must be filed in the Court of Appeals within 30 days. 17 U.S.C. §810 (1976). Thus, even if we were to treat the complaint as a petition for review, and its filing in the District Court as tolling the running of the period in which review may be sought, jurisdiction still would be absent because the District Court complaint was not filed within 30 days. See Fed R. App. P. 26(b). (court may not enlarge the time prescribed by law for filing a petition for review)."

On August 20, 1980 petitioners filed a timely petition for rehearing *en banc* which the court denied September 9, 1980. Thereafter petitioners applied for a stay of mandate and on September 19, 1980 moved for further reconsideration of the petition for rehearing. The motion for reconsideration was grounded upon the above-quoted comment which shows that the court of appeals apparently overlooked the fact that petitioners' complaint was timely filed, i.e., petitioners filed the

complaint on October 27, 1978 at a time when petitioners had pending at the Tribunal a motion for reconsideration of the regulations which was filed on October 18, 1978, and was denied by the Tribunal on November 9, 1978. The case was pending in the district court until February 22, 1979 when the court granted judgment for the respondents. Therefore, there was no delay by petitioners in seeking judicial review of the regulations.[1] Accordingly, on the basis of the court's indicated willingness to consider the complaint as a petition for review, had the filing been timely, petitioners urged the court to reconsider the apparent oversight and to grant the petition for rehearing. The court denied petitioners' motion on October 22, 1980.

ARGUMENT

I.

SECTION 810 OF THE COPYRIGHT ACT DOES NOT CONFER JURISDICTION UPON THE COURT OF APPEALS TO REVIEW REGULATIONS PROMULGATED BY THE TRIBUNAL UNDER SECTION 116(c)(5) OF THE ACT.

Section 116(b) of the Copyright Act provides for the registration of jukeboxes and for payment of jukebox royalty fees at the Copyright Office. Section 116(c) provides for distribution of jukebox royalty fees by the Copyright Royalty Tribunal. Section 116(c)(2) authorizes the Tribunal to prescribe procedures whereby

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[1] Petitioners filed their complaint in the district court October 27, 1978, without waiting for the Tribunal's action on the petition for reconsideration because the Tribunal's regulations required jukebox operators to file location lists not later than November 1, 1978.

claimants to jukebox royalty fees shall file their claims. Section 116(c)(5) authorizes the Tribunal to promulgate regulations whereby persons who can reasonably be expected to have such claims may have access to jukebox locations to obtain information to support their claims. Section 116(c)(5) is the rulemaking authority for the regulations that are the subject of this litigation.

Section 810 provides for judicial review by the court of appeals of final decisions of the Tribunal in proceedings under section 801(b). Insofar as those proceedings pertain to the jukebox royalty under section 116 those proceedings concern only determinations with respect to royalty rates under 801(b)(1) and adjudications of disputes over distribution of royalty fees under 801(b)(3).[2] *No other review jurisdiction is conferred by section 810.*

The court of appeals correctly viewed section 810 as a special statutory procedure that conferred upon it exclusive jurisdiction to review the final decisions of the Tribunal in proceedings under sections 801(b)(1) and 801(b)(3). It does not follow, however, that review of the Tribunal's rulemaking under section 116(c)(5) is encompassed within that special grant of authority.

Even though the rulemaking proceedings under section 116(c)(5) are related by their subject matter to

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[2]There has been no proceeding for adjudication of a jukebox royalty dispute to date. The first jukebox royalty pool composed of license fees collected in 1978, was distributed by the Tribunal in 1979, by agreement of the "performing rights societies" representing all but a small percentage of unaffiliated copyright owners, for whom a small sum was reserved.

proceedings under section 801(b)(3) for the adjudication of disputes concerning distribution of jukebox royalty fees, those proceedings are entirely separate and distinct. Based upon that inter-relationship, however, the court of appeals asserted in its decision that "the statute in this matter incorporates section 116 regulations into the Tribunal's 801(b) powers," and on that reasoning the court concluded that section 810 gave it exclusive jurisdiction to review the regulations under 116(c)(5).

Petitioners submit, however, that the court's conclusion is merely *ipsi dixit*—an interpretation designed to extend that court's authority beyond the clear wording of the statute, wording that explicitly limits the scope of judicial review by that court to final determinations concerning royalty rates and final determinations concerning distribution of royalty fees.

To support its conclusion the court quoted from its earlier decision in *City of Rochester v. Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979), where the principle is stated that "If, however, there exists a special statutory review procedure, it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining review *in those cases to which it applies*" (emphasis added). This, however, is not a case to which the principle applies. The court of appeals simply is wrong in its interpretation of the statute in this case.

In *PBW Stock Exchange Inc. v. Securities and Exchange Commission*, 485 F.2d 718 (3d Cir. 1973), cert. denied 416 U.S. 969 (1974), the court of appeals for the third circuit held that it did not have jurisdiction to review a rule regarding membership on securities

exchanges promulgated by the Commission under the Securities Exchange Act. The court of appeals examined the context and structure of the Act and its legislative history and concluded that precedent decisions of the Supreme Court, commencing with *AFL v. National Labor Relations Board*, 308 U.S. 401 (1940), compelled it to hold that direct review by the Court of Appeals of the Commission's rule was not permissible notwithstanding provisions of the Act that vest exclusive jurisdiction in that court to review orders of the Commission under that Act (15 U.S.C. 78a, 78y(a)).

We submit that if the Court of Appeals of this circuit had considered the context and structure of the Copyright Act and its legislative history and had adhered to the precedent decisions of the Supreme Court as the Court of Appeals for the third circuit had done, this Court of Appeals would have concluded that it too lacked jurisdiction to review the Tribunal's regulations that are the subject of this action.

II.

THE DISTRICT COURT DOES HAVE JURISDICTION TO REVIEW THE REGULATIONS IN QUESTION UNDER SECTION 1331 OF THE JUDICIAL CODE, AND SECTION 803(a) OF THE COPYRIGHT ACT.

It is well settled that a party who is injured by federal agency action is presumptively entitled to judicial review in a federal court and that, in the absence of a special statutory review procedure, "non-statutory" review may be sought in a district court under any applicable jurisdictional grant. *Abbott Laboratories v.*

Gardner, 387 U.S. 163, 142, 143 (1967).[3]

Section 1331 of the Judicial Code is now recognized as the basic authority for district court review of federal agency action in the absence of a special statute authorizing review by a particular court. *Califano v. Sanders*, 430 U.S. 99 (1977).

In Chapter 7 of the Administrative Procedure Act (28 U.S.C. 701-706), which provides comprehensively for judicial review of federal agency actions, Congress has expressed the intent that a party who is injured by an agency action shall have a right to relief in some "court of competent jurisdiction." In the absence of a statutory provision to the contrary, the court of competent jurisdiction is the federal district court, which has general jurisdiction under 28 U.S.C. 1331 or

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[3]The governing principles are summarized in *City of Rochester v. Bond, supra*, as follows:

> "The principles which frame our decision are unexceptionable. The first is that one who has been injured by agency action is presumptively entitled to judicial review. This presumption is codified in the Administrative Procedure Act and evident in the cases, and nothing in the circumstances of this case suggests that appellants' allegations were not reviewable somewhere. Second, Congress, acting within its constitutional powers, may freely choose the court in which judicial review may occur. In the absence of a statute prescribing review in a particular court, "non-statutory" review may be sought in district court under any applicable jurisdictional grant. If, however, there exists a special statutory review procedure, it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it aplies. We think that this is so in the present case." (footnote references omitted)

other statutes (see Davis, Administrative Law Treatise, § 23.02, Supp. 1980).

By section 803(a) of the Copyright Act Congress has expressed the same intent, declaring that "Except as otherwise provided in this chapter, the Tribunal shall be subject to the provisions of the Administrative Procedure Act of June 11, 1946, as amended (c. 324, 60 Stat 237, title 5, United States Code, chapter 5, subchapter II and chapter 7)."

Other sections of the Judicial Code provide authority for the district court to grant the relief petitioners have prayed for in this case: 1361 (mandamus), 1651 (all writs) and 2201 (declaratory judgments).

III.

IF THE COURT OF APPEALS WAS CORRECT IN DECIDING IT HAS JURISDICTION UNDER 17 U.S.C. 810 TO REVIEW THE TRIBUNAL'S REGULATIONS IT SHOULD HAVE CONSIDERED PETITIONERS' COMPLAINT AS A TIMELY FILED PETITION FOR REVIEW.

The court of appeals indicated in the footnote to its opinion of August 7, 1980, quoted above (page 8), that it might have considered petitioners' complaint as a petition for review but for the time sequence of petitioners' filing of their complaint. As we have previously shown (pages 8 and 9 above), the case was pending in the district court from October 27, 1978, when the complaint was filed, until February 23, 1979, when the district court granted judgment for the respondents. On October 17, 1978 petitioners filed a motion with the Tribunal for reconsideration of the regulations and the Tribunal denied the petition as its final action on the

regulations on November 9, 1978. The Tribunal's final decision was a matter of record in the district court when it granted judgment for the respondents.

IV.

THE COURT OF APPEALS HAS DECIDED IMPORTANT QUESTIONS OF LAW WHICH SHOULD BE SETTLED BY THIS COURT, SPECIFICALLY, THE DECISION BELOW THAT THE COURT OF APPEALS HAS JURISDICTION TO REVIEW THE REGULATIONS OF THE TRIBUNAL THAT ARE THE SUBJECT OF THIS LITIGATION, AND THE GUIDANCE THE COURT OF APPEALS AS IMPOSED UPON ALL LITIGANTS WHO SEEK JUDICIAL REVIEW OF AGENCY ACTIONS TO FILE PETITIONS IN BOTH THE DISTRICT COURT AND THE COURT OF APPEALS WHENEVER THERE IS "ANY DOUBT" AS TO THE PROPER CHOICE OF FORUM.

The decision below affects not only those persons who have interests in jukebox royalty fees under section 116 of the Copyright Act but it also affects all users and suppliers of music who are subject to the licensing requirements of the Act under sections 111 (cable television), 115 (recording of phonorecords), 116 (jukebox operation) and 118 (public broadcasting). As a precedent, the decision below also affects all litigants who seek judicial review of federal agencies' rulemaking. Petitioners submit the decision is wrong for the reasons hereinabove stated and it should be reviewed by this Court.

In an earlier decision, *Investment Company Institute v. Board of Governors of the Federal Reserve System*, 551 F.2d 1270, 1282 (1977), which involved the issue

of choice of forum for review of agency rulemaking, the court of appeals advised that "In the future, we would expect competent counsel to file petitions in both courts or at least in the court of appeals, if there is any doubt as to the appropriate forum for judicial review."

Petitioners contend there is no doubt that the proper forum for judicial review of the Tribunal's regulations that are the subject of this litigation is the federal district court acting under 28 U.S.C. 1331. Indeed, as we have shown, petitioners clearly were prohibited by the express wording of 17 U.S.C. 810 from seeking review by the court of appeals of the Tribunal's regulations in this case.

Petitioners contend further that the court of appeals' guidance that petitions should be filed in *both* courts, in case of "any doubt," leaves the issue of choice of forum in a state of unacceptable uncertainty, depending as it does upon the subjective test of "doubt" in the mind of the person who is responsible for exercising that choice. This guidance by the court unnecessarily increases the already high cost of litigation and violates the court's own concern about the wasting of judicial resources (see decision below, p. 9a). Under the court's decision we would now have the possibility of three judicial actions: one in district court, one on appeal from the district court, and one on direct review in the court of appeals. This indeed constitutes a waste of judicial resources.

The uncertain state of the law on this subject cries out for resolution by this Court.

CONCLUSION

Accordingly, for all of the foregoing reasons, petitioners urge the Court to grant a writ of certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION No. 78-2030
[Filed October 30, 1978]

AMUSEMENT AND MUSIC OPERATORS ASSOCIATION, et al.

Plaintiffs

v.

THE COPYRIGHT ROYALTY TRIBUNAL, et al.

Defendants.

ORDER

Upon consideration of Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction, and upon consideration of the arguments of counsel and the entire record herein, it appearing to the Court that Plaintiffs have failed to satisfy the requirements of *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958) and *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), especially in that Plaintiffs have not demonstrated any likelihood of prevailing on the merits of this action, it is by the Court this 30th day of October, 1978,

ORDERED, that Plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction is hereby DENIED; and it is

FURTHER ORDERED, that Plaintiffs and Defendants shall submit a proposed briefing schedule on the issue of final relief within ten (10) days of the date of this Order.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-2065

CIVIL ACTION NO. 78-2030
[Filed November 1, 1978]

Amusement and Music Operators Association, et al.,

Appellants,

v.

The Copyright Royalty Tribunal, et al.

Before: Bazelon and Tamm, Circuit Judges

ORDER

On consideration of appellants' motion for order overruling the District Court's denial of motion for temporary restraining order and preliminary injunction,

of appellees' motion for summary affirmance, and of the record on appeal herein, it is

ORDERED by the Court that appellants' aforesaid motion is denied. It is

FURTHER ORDERED by the Court that appellees' motion for summary affirmance is granted.

Per Curiam

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 78-2030
[Filed February 22, 1979]

AMUSEMENT & MUSIC OPERATORS ASSOCIATION, et al.,

Plaintiffs,

v.

COPYRIGHT ROYALTY TRIBUNAL, et al.,

Defendants.

ORDER

This matter having come before the Court on Defendants' Motion to Dismiss and/or for Summary Judgment, Plaintiffs' Memorandum In Opposition, and the entire record herein,

It is this 22nd day of February, 1979,

ORDERED that Defendants' Motion be and hereby is granted, and it is

FURTHER ORDERED that Plaintiffs' Complaint be and hereby is dismissed.

/s/ Aubrey E. Robinson, Jr.
AUBREY E. ROBINSON, JR.
United States District Judge

APPENDIX D

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1543

AMUSEMENT AND MUSIC OPERATORS ASSOCIATION, a CORPORATION, *et al.*, APPELLANTS

v.

THE COPYRIGHT ROYALTY TRIBUNAL, *et al.*

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil No. 78-2030)

Argued May 6, 1980

Decided August 7, 1980

Judgment entered this date

Nicholas E. Allen, with whom *Philip F. Herrick*, *James Michael Bailey*, and *Suzanne V. Richards* were on the brief, for appellants.

Michael J. Ryan, Assistant United States Attorney, with whom *Carl S. Rauh*, United States Attorney at the

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

time the brief was filed, and *John A. Terry*, Assistant United States Attorney, were on the brief, for appellees.

Before MCGOWAN and ROBINSON, *Circuit Judges*, and OBERDORFER *, *United States District Judge* for the District of Columbia.

Opinion for the Court filed by *Circuit Judge* MCGOWAN.

MCGOWAN, *Circuit Judge*: Congress in 1976 established a new agency, the Copyright Royalty Tribunal, and conferred upon it certain powers with respect to the setting of royalty rates and adjudication of royalty claims. The Tribunal also has the power to promulgate regulations governing access to "phonorecord players"—jukeboxes—so that persons having claims to royalties may determine the amount owed them by jukebox owners.

Knowing the *location* of jukeboxes reasonably might be thought to be a necessary antecedent to obtaining *access* to them; thus, the Tribunal in 1978 issued regulations requiring jukebox operators to submit to the Tribunal a list of the locations of their jukeboxes and the number of machines at each location.

Appellant is an organization representing jukebox owners aggrieved by the new regulations. Appellant sued in the District Court, asking that the regulations be set aside because, *inter alia*, they violated the Copyright Act, the Federal Reports Act, and the Fifth Amendment, and because the Tribunal itself was unconstitutionally organized as a component of the legislative branch.

The District Court denied appellant's prayer for preliminary relief, and this court summarily affirmed.[1] The parties then filed cross-motions for summary judgment

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

[1] Amusement & Music Operators Ass'n v. Copyright Royalty Tribunal, No. 78-2065 (D.C. Cir. Nov. 1, 1978).

in the District Court, which entered judgment upholding the regulations. This appeal followed.

A

Before considering any of the substantive challenges to the regulations, we must decide whether the District Court had jurisdiction in this case. Specifically, we must decide whether appellant properly sought judicial review of the regulations in the District Court, or whether it should have come directly to the Court of Appeals.

Both parties contend that appellant correctly complained in the District Court.[2] However, the parties cannot by mutual consent confer subject matter jurisdiction where it does not otherwise exist;[3] the Court, *sua sponte*, must consider jurisdictional difficulties that it perceives.[4] Upon consideration of the statute's language and structure, we hold that it mandates direct review in the Court of Appeals of these regulations. Thus, because appellant in this case erroneously sought review in the District Court, we vacate the decision under review and remand to the District Court with instructions to dismiss the complaint.[5]

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[2] We raised the jurisdictional question *sua sponte*, and permitted both parties to file supplemental briefs on that issue prior to oral argument.

[3] *E.g.*, Clark v. Paul Gray, Inc., 306 U.S. 583, 588 (1939); *see* Green v. Department of Commerce, No. 79-1509, slip op. at 5-6 (D.C. Cir. Feb. 26, 1980) (lack of finality is a jurisdictional flaw that cannot be waived).

[4] That we earlier entertained on the merits an appeal from the denial of preliminary relief, *see* note 1 *supra*, does not prevent us now from examining the question of jurisdiction. Green v. Department of Commerce, No. 79-1509, slip op. at 6 n.9 (D.C. Cir. Feb. 26, 1980); Potomac Passengers Ass'n v. Chesapeake & Ohio Ry., 520 F.2d 91, 95 n.22 (D.C. Cir. 1975).

[5] The complaint in the District Court was filed 37 days after the promulgation of the regulations at issue. Petitions for

B

The judicial review provision of the statute is 17 U.S.C. section 810. It provides:

> *Any final decision of the Tribunal in a proceeding under section 801(b) may be appealed to the United States Court of Appeals, within thirty days after its publication in the Federal Register by an aggrieved party.* The judicial review of the decision shall be had, in accordance with chapter 7 of title 5, on the basis of the record before the Tribunal. *No court shall have jurisdiction to review a final decision of the Tribunal except as provided in this section.* [Emphasis added.]

Section 801(b) permits the Tribunal, *inter alia*, "to *make determinations* concerning the adjustments of reasonable copyright royalty rates as provided in section 115 and 116 . . . ." (Emphasis added.) Section 116, in turn, is the section under which these regulations were issued.[6] The statute in this matter incorporates section

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review of Tribunal regulations must be filed in the Court of Appeals within 30 days. 17 U.S.C. § 810 (1976). Thus, even if we were to treat the complaint as a petition for review, and its filing in the District Court as tolling the running of the period in which review may be sought, jurisdiction still would be absent because the District Court complaint was not filed within 30 days. *See* Fed. R. App. P. 26(b). (court may not enlarge the time prescribed by law for filing a petition for review).

[6] 17 U.S.C. section 116 provides, in pertinent part:

* * * *

> (5) The Copyright Royalty Tribunal shall promulgate regulations under which persons who can reasonably be expected to have claims may, during the year in which performances take place, without expense to or harassment of operators or proprietors of establishments in which phonorecord players are located, have such access to such establishments and to the phonorecord players located therein and such opportunity to obtain informa-

116 regulations into the Tribunal's section 801(b) powers. Determinations under section 801(b) are, as we have seen, reviewable only in the Court of Appeals.

Logic also supports direct review in the Court of Appeals. In general, agency action is aptly examined in the District Court when the court proceeding is to be *de novo* and based on a new record compiled in the court itself. Where review is to be on the *agency record*, the Court of Appeals is well suited to consider the challenge in the first instance.[7] In this case, section 810 provides that judicial review is to be conducted pursuant to the Administrative Procedure Act (APA) "on the basis of the record before the Tribunal." Thus, the reviewing court is not to compile its own record, but is to examine the existing record to see if the Tribunal's decision was arbitrary, capricious, or otherwise not in accordance with law. Judicial resources would be wasted if parties could press their case upon the administrative agency, then obtain review on the agency record in the District Court,

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tion with respect thereto as may be reasonably necessary to determine, by sampling procedures or otherwise, the proportion of contribution of the musical works of each such person to the earnings of the phonorecord players for which fees shall have been deposited. Any person who alleges that he or she has been denied the access permitted under the regulations prescribed by the Copyright Royalty Tribunal may bring an action in the United States District Court for the District of Columbia for the cancellation of the compulsory license of the phonorecord player to which such access has been denied, and the court shall have the power to declare the compulsory license thereof invalid from the date of issue thereof.

[7] In this case, the Tribunal compiled a substantial record. The Tribunal in December 1977 issued notice of proposed rulemaking, and in May 1978 published a proposed rule. A formal hearing was held in June 1978, at which appellant made formal statements, and presented and cross-examined witnesses.

and then enjoy an appeal as of right to the Court of Appeals, which would perform precisely the same function. We think that Congress intended to avoid this redundancy by providing in section 810 for direct review in the Court of Appeals.

C

Both parties contend that jurisdiction nevertheless existed in the District Court pursuant to section 803 of the Act, sections 553 and 701 of the APA, and sections 1331, 1361, 1651, and 2201 of the Judicial Code. None of these, however, confers jurisdiction on the District Court to review the instant regulations.

Appellant principally contends that the District Court had jurisdiction pursuant to 17 U.S.C. section 803, which provides:

> § 803. Procedures of the Tribunal
>
> (a) The Tribunal shall adopt regulations, not inconsistent with law, governing its procedures and methods of operation. Except as otherwise provided in this chapter, the Tribunal shall be subject to the provisions of the Administrative Procedure Act of June 11, 1946, as amended (c. 324, 60 Stat. 237, title 5, United States Code, chapter 5, subchapter II and chapter 7).
>
> (b) Every final determination of the Tribunal shall be published in the Federal Register. It shall state in detail the criteria that the Tribunal determined to be applicable to the particular proceeding, the various facts that it found relevant to its determination in that proceeding, and the specific reasons for its determination.

This section is inapposite. First, the Tribunal promulgated the instant regulations pursuant to section 116. Section 803, by contrast, deals only with regulations per-

taining to the Tribunal's *methods of operation.*[8] Second, section 803 does not address judicial review. It provides only that the Tribunal shall "be subject to the provisions of the Administrative Procedure Act." That language arguably does not even provide for judicial review of procedural regulations; in any event, it nowhere specifies the court in which review is to occur.

Appellant alleges various other bases for jurisdiction in the District Court, but none is effective. The Declaratory Judgment Act, 28 U.S.C. § 2201, and the APA do not independently confer jurisdiction.[9] Nor is this an action in the nature of mandamus within the meaning of 28 U.S.C. sections 1361 and 1651.

Only the general federal question statute, 28 U.S.C. section 1331, arguably confers jurisdiction on the District Court. However, where "there exists a special statutory review procedure, it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies," notwithstanding section 1331. *City of Rochester v. Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979). We have seen that section 810 is a specific jurisdictional grant of that sort; accordingly, appellant's invocation of the general federal question statute is unavailing.

In sum, appellant here incorrectly sought review of the Tribunal's regulations in the District Court. Because the District Court lacked jurisdiction, we vacate its grant of summary judgment to appellee, and remand with instructions to dismiss the complaint for lack of jurisdiction.

It is so ordered.

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[8] Procedural regulations pursuant to section 803 have, in fact, been promulgated. 37 C.F.R. § 301 *et seq.* (1979).

[9] *E.g.*, Califano v. Sanders, 430 U.S. 99 (1977) (APA); Seibert v. Baptist, 594 F.2d 423 (5th Cir. 1979) (Declaratory Judgment Act).

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA
September Term, 1979

No. 79-1543

CIVIL ACTION NO. 78-2030
[Filed September 9, 1980]

Amusement and Music Operators Association,
a corporation, et al.,

Appellants,

v.

The Copyright Royalty Tribunal, et al.

BEFORE: McGowan and Robinson, Circuit Judges; and Oberdorfer,* Judge, United States District Court for the District of Columbia.

ORDER

Upon consideration of appellants' petition for rehearing, it is

ORDERED, by the Court, that appellants' aforesaid petition for rehearing is denied.

Per Curiam
FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1979

No. 79-1543

CIVIL ACTION NO. 78-2030
[Filed September 9, 1980]

Amusement and Music Operators Association,
a corporation, et al.,

Appellants,

v.

The Copyright Royalty Tribunal, et al.

BEFORE: Wright, Chief Judge; McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, Nikva, Edwards, and Ginsburg, Circuit Judges.

ORDER

The suggestion for rehearing *en banc* filed by appellants (Amusement and Music Operations Assoc., a corp., et al.) having been transmitted to the full Court and no judge in regular active service having requested a vote with respect thereto, it is

ORDERED, by the Court, *en banc*, that appellants' aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam
FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1980

No. 79-1543

CIVIL ACTION NO. 78-2030
[Filed October 22, 1980]

Amusement and Music Operators Association,
a corporation, et al.,
Appellants

v.

The Copyright Royalty Tribunal, et al.

Before: McGowan and Robinson, Circuit Judges; and Oberdorfer, United States District Court for the District of Columbia

ORDER

It appearing that appellant Amusement and Music Operators Association has lodged in the Clerk's Office a motion for further consideration of its petition for rehearing, it is

ORDERED, by the Court, that the Clerk is directed to file appellant's lodged motion for further reconsideration and to enter same on the docket; and it is

FURTHER ORDERED, by the Court, that appellant's motion for further reconsideration is denied.

Per Curiam
FOR THE COURT

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

APPENDIX H

STATUTES:

[Extracts from the Copyright Act of 1976
17 U.S.C. 101 et seq.]

§116. Scope of exclusive rights in nondramatic musical works: Public performances by means of coin-operated phonorecord players

* * * * *

(b) RECORDATION OF COIN-OPERATED PHONORECORD PLAYER, AFFIXATION OF CERTIFICATE, AND ROYALTY PAYABLE UNDER COMPULSORY LICENSE. –

(1) Any operator who wishes to obtain a compulsory license for the public performance of works on a coin-operated phonorecord player shall fulfill the following requirements:

(A) Before or within one month after such performances are made available on a particular phonorecord player, and during the month of January in each succeeding year that such performances are made available on that particular phonorecord player, the operator shall file in the Copyright Office, in accordance with requirements that the Register of Copyrights, after consultation with the Copyright Royalty Tribunal (if and when the Tribunal has been constituted), shall prescribe by regulation, an application containing the name and address of the operator of the phonorecord player and the manufacturer and serial number or other explicit identification of the phonorecord player, and deposit with the Register of Copyrights a royalty fee for the current calendar year of $8 for that particular phonorecord player. If such performances are made available on a particular phonorecord player for the first

time after July 1 of any year, the royalty fee to be deposited for the remainder of that year shall be $4.

* * * * *

(c) DISTRIBUTION OF ROYALTIES. –

(1) The Register of Copyrights shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal as provided by this title. The Register shall submit to the Copyright Royalty Tribunal, on an annual basis, a detailed statement of account covering all fees received for the relevant period provided by subsection (b).

(2) During the month of January in each year, every person claiming to be entitled to compulsory license fees under this section for performances during the preceding twelve-month period shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation. Such claim shall include an agreement to accept as final, except as provided in section 810 of this title, the determination of the Copyright Royalty Tribunal in any controversy concerning the distribution of royalty fees deposited under subclause (A) of subsection(b)(1) of this section to which the claimant is a party. Notwithstanding any provisions of the antitrust laws, for purposes of this subsection any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them joint-

ly or as a single claim, or may designate a common agent to receive payment on their behalf.

(3) After the first day of October of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees deposited under subclause(A) of subsection (b)(1). If the Tribunal determines that no such controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If it finds that such a controversy exists, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

(4) The fees to be distributed shall be divided as follows:

(A) to every copyright owner not affiliated with a performing rights society, the pro rata share of the fees to be distributed to which such copyright owner proves entitlement.

(B) to the performing rights societies, the remainder of the fees to be distributed in such pro rata shares as they shall by agreement stipulate among themselves, or, if they fail to agree, the pro rata share to which such performing rights societies prove entitlement.

(C) during the pendency of any proceeding under this section, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

(5) The Copyright Royalty Tribunal shall promulgate regulations under which persons who can reasonably be expected to have claims may, during the year in which

performances take place, without expense to or harassment of operators or proprietors of establishments in which phonorecord players are located, have such access to such establishments and to the phonorecord players located therein and such opportunity to obtain information with respect thereto as may be reasonably necessary to determine, by sampling procedures or otherwise, the proportion of contribution of the musical works of each such person to the earnings of the phonorecord players for which fees shall have been deposited. Any person who alleges that he or she has been denied the access permitted under the regulations prescribed by the Copyright Royalty Tribunal may bring an action in the United States District Court for the District of Columbia for the cancellation of the compulsory license of the phonorecord player to which such access has been denied, and the court shall have the power to declare the compulsory license thereof invalid from the date of issue thereof.

* * * * *

Chapter 8. – COPYRIGHT ROYALTY TRIBUNAL

Sec.

801. Copyright Royalty Tribunal: Establishment and purpose.
802. Membership of the Tribunal.
803. Procedures of the Tribunal.
804. Institution and conclusion of proceedings.
805. Staff of the Tribunal.
806. Administrative support of the Tribunal.
807. Deduction of costs of proceedings.
808. Reports.
809. Effective date of final determinations.
810. Judicial review.

§801. Copyright Royalty Tribunal: Establishment and purpose

(a) There is hereby created an independent Copyright Royalty Tribunal in the legislative branch.

(b) Subject to the provisions of this chapter, the purposes of the Tribunal shall be–

1) to make determinations concerning the adjustment of reasonable copyright royalty rates as provided in sections 115 and 116, and to make determinations as to reasonable terms and rates of royalty payments as provided in section 118. The rates applicable under sections 115 and 116 shall be calculated to achieve the following objectives:

(A) To maximize the availability of creative works to the public;

(B) To afford the copyright owner a fair return for his creative work and the copyright user a fair income under existing economic conditions;

(C) To reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their communication;

(D) To minimize any disruptive impact on the structure of the industries involved and on generally prevailing industry practices.

* * * * *

(3) to distribute royalty fees deposited with the Register of Copyrights under sections 111 and 116, and to determine, in cases where controversy exists, the distribution of such fees.

* * * * *

§803. Procedures of the Tribunal

(a) The Tribunal shall adopt regulations, not inconsistent with law, governing its procedure and methods of operation. Except as otherwise provided in this chapter, the Tribunal shall be subject to the provisions of the Administrative Procedure Act of June 11, 1946, as amended (c. 324, 60 Stat. 237, title 5, United States Code, chapter 5, subchapter II and chapter 7).

* * * * *

§810. Judicial review

Any final decision of the Tribunal in a proceeding under section 801(b) may be appealed to the United States Court of Appeals, within thirty days after its publication in the Federal Register by an aggrieved party. The judicial review of the decision shall be had, in accordance with chapter 7 of title 5, on the basis of the record before the Tribunal. No court shall have jurisdiction to review a final decision of the Tribunal except as provided in this section.

APPENDIX I

[Extracts from the Federal Reports Act,
as amended 44 U.S.C. 3501 et seq.]

§3501. Information for Federal agencies

Information needed by Federal agencies shall be obtained with a minimum burden upon business enterprises, especially small business enterprises, and other persons required to furnish the information, and at a minimum cost to the Government. Unnecessary duplication of efforts in obtaining information through the use of reports, questionnaires, and other methods shall be eliminated as rapidly as practicable. Information collected and tabulated by a Federal agency shall, as far as is expedient, be tabulated in a manner to maximize the usefulness of the information to other Federal agencies and the public.

§3502. Definitions

As used in this chapter –

"Federal agency" means an executive department, commission, independent establishment, corportation owned or controlled by the United States, board, bureau, division, service, office, authority, or adiministration in the executive branch of the Government; but does not include the General Accounting Office, independent Federal regulatory agencies, nor the governments of the District of Columbia and of the territories and possessions of the United States, and their various subdivisions;

"person" means an individual, partnership, association, corporation, business trust, or legal representative, an organized group of persons, a State or territorial government or branch, or a political subdivision of a State or territory or a branch of a political subdivision;

"information" means facts obtained or solicited by the use of written report forms, application forms, schedules, questionnaires, or other similar methods calling either for answers to identical questions from ten or more persons other than agencies, instrumentalities, or employees of the United States or for answers to questions from agencies, instrumentalities, or employees of the United States which are to be used for statistical compilations of general public interest.

* * * * *

§3512. Information for independent regulatory agencies

(a) The Comptroller General of the United States shall review the collection of information required by independent Federal regulatory agencies described in section 3502 of this chapter to assure that information required by such agencies is obtained with a minimum burden upon business enterprises, especially small business enterprises, and other persons required to furnish the information. Unnecessary duplication of efforts in obtaining information already filed with other Federal agencies or departments through the use of reports, questionnaires, and other methods shall be eliminated as rapidly as practicable. Information collected and tabulated by an independent regulatory agency shall, as far as is expedient, be tabulated in a manner to maximize the usefulness of the information to other Federal agencies and the public.

(b) In carrying out the policy of this section, the Comptroller General shall review all existing information gathering practices of independent regulatory agencies as well as requests for additional information with a view toward –

(1) avoiding duplication of effort by independent regulatory agencies, and

(2) minimizing the compliance burden on business enterprises and other persons.

(c) In complying with this section, an independent regulatory agency shall not conduct or sponsor the collection of information upon an identical item from ten or more persons, other than Federal employees, unless, in advance of adoption or revision of any plans or forms to be used in the collection –

(1) the agency submitted to the Comptroller General the plans or forms, together with the copies of pertinent regulations and of other related materials as the Comptroller General has specified; and

(2) the Comptroller General has advised that the information is not presently available to the independent agency from another source within the Federal Government and has determined that the proposed plans or forms are consistent with the provision of this section. The Comptroller General shall maintain facilities for carrying out the purposes of this section and shall render such advice to the requestive independent regulatory agency within forty-five days.

(d) While the Comptroller General shall determine the availability from other Federal sources of the information sought and the appropriateness of the forms for the collection of such information, the independent regulatory agency shall make the final determination as to the necessity of the information in carrying out its statutory responsibilities and whether to collect such information. If no advice is received from the Comptroller General within forty-five days, the independent regulatory agency may immediately proceed to obtain such information.

APPENDIX J

Extracts from the Administrative Procedure Act as amended, 5 U.S.C. 702, 703, 704, 705, 706.

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

§ 703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the

subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

§ 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

§ 705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be

required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in escess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX K

Extracts from the Judicial Code, as amended 28 U.S.C. 1331, 1361, 1651, 2201

§1331. Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

§1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

§1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

§ 2201. Creation of remedy

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

APPENDIX L

REGULATIONS:

[Extracts from the Copyright Royalty Tribunal's Regulations under 17 U.S.C. 116(c)(5)]

FEDERAL REGISTER, VOL. 43, NO. 177 – TUESDAY, SEPTEMBER 12, 1978

§303.1 General.

This regulation prescribes the procedures pursuant to 17 U.S.C. 116 by which persons who can reasonably be expected to have claims to royalty fees paid by the operators of coin-operated phonorecord players under the compulsory license established by 17 U.S.C. 116 may have access to the establishments in which such phonorecord players are located and to the phonorecord players located therein to obtain information which may be reasonably necessary to determine the proportion of contribution of the musical works of each such person to the earnings of the phonorecord players for which fees shall have been deposited. The terms "operator" and "coin-operated phonorecord player" have the meanings given to them by paragraph (3) of section 116 of title 17.

§303.2 Access to establishments and phonorecord players.

A person, or authorized representatives of such person, who can reasonably be expected to have claims to royalty fees paid by the operators of phonorecord players shall have access to the establishments in which such phonorecord players are located during customary business hours on regular business days. Such access shall be only for the purpose of obtaining information concerning the performance of musical works by the phonorecord players. The right of access shall be exercised in such a manner as not to cause any significant interference with the normal functioning of an establishment.

§303.3 Recording of location listings in Copyright Royalty Tribunal.

(a) Not later than November 1, 1978, every operator of a phonorecord player who has filed in the Copyright Office an application for a phonorecord player compulsory license according to the requirements of 17 U.S.C. 116 and the regulations of the Copyright Office and been issued prior to October 1, 1978 a Copyright Office phonorecord player certificate, shall record in the offices of the Copyright Royalty Tribunal a list identifying the location or locations where licensed phonorecord players of the operator are placed, and the number of phonorecord players at any location with more than one such player.

(b) Every operator of a phonorecord player who subsequent to October 1, 1978, obtains his initial Copyright Office phonorecord certificate shall record in the office of the Copyright Royalty Tribunal within thirty days after the issuance of the initial certificate a list identifying the location or locations where licensed phonorecord players of the operator are placed, and the number of phonorecord players at any location with more than one such player.

(c) On October 1 of each year every operator of a phonorecord player who alters the number of licensed phonorecord players at a location reported under paragraph (a) or (b) of this section, or who has provided a licensed phonorecord player or players to a location not previously reported to the Copyright Royalty Tribunal shall report to the Copyright Royalty Tribunal the revised number of phonorecord players or that new location and the number of licensed phonorecord players at the location.

(d) The location listing required under this section shall include the full address of the location, including a specific number and street name or rural route.

Approved: September 6, 1978.

THOMAS C. BRENNAN,
Chairman,
Copyright Royalty Tribunal.

[FR Doc. 78-25559 Filed 9-11-78; 8:45 am]

APPENDIX M

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1543
(C.A. No. 78-2030)

AMUSEMENT AND MUSIC OPERATORS ASSOCIATION, *et al.*,

Appellants,

v.

COPYRIGHT ROYALTY TRIBUNAL, *et al.*,

Appellees.

MEMORANDUM OF APPELLEES

Pursuant to this Court's order of February 29, 1980, appellees respectfully submit their views as to whether, in view of 17 U.S.C. §810, the district court had jurisdiction over this case.

Pursuant to 17 U.S.C. §810, authority to conduct judicial review of final decisions of the Copyright Royalty Tribunal in proceedings under 17 U.S.C. §801(b), *viz.*, final decisions regarding determination of copyright royalty rates or distribution of royalty fees, is vested exclusively in the United States Court of Appeals. Any other judicial review of final decisions of the Tribunal is precluded by 17 U.S.C. §810. The instant case, however, does not involve a final decision by the Tribunal regarding rate determination or distribution of royalties, and does not arise out of a

proceeding under 17 U.S.C. §801(b). Instead, this matter constitutes a challenge by appellants to the authority of the Tribunal to issue regulations pursuant to the mandate contained in 17 U.S.C. §116(c)(5). Those regulations, regarding access of copyright owners to establishments containing jukeboxes, were adopted by the Tribunal following full procedural rulemaking, including notice of and the opportunity to comment upon the proposed regulations. Judicial review of these regulations then commenced in the district court pursuant to, *inter alia*, 17 U.S.C. §803(a). To the extent that the Tribunal "decided" to adopt the regulations after hearings on the matter, appellees submit that such a decision is not contemplated within the purview of 17 U.S.C. §810, and that the usual judicial review afforded in district court upon challenge to a regulation is not precluded by that section which is intended to cover other proceedings of the Tribunal specified therein.

Accordingly, for the reasons stated, it is the position of appellees that the district court had jurisdiction over the subject matter of this action.

/s/ Charles F. C. Ruff
CHARLES F. C. RUFF
United States Attorney

/s/ John A. Terry
JOHN A. TERRY
Assistant United States Attorney

/s/ Michael J. Ryan
MICHAEL J. RYAN
Assistant United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing memorandum was mailed to counsel for appellants, Nicholas E. Allen, Esquire, and Philip F. Herrick, Esquire, 1701 K Street, N.W., Washington, D.C. 20006 on this 10th day of March 1980.

/s/ Michael J. Ryan
MICHAEL J. RYAN
Assistant United States Attorney